Eastern Omni Constructors, Inc. *and* Local Union 342, International Brotherhood of Electrical Workers, AFL–CIO. Case 11–CA–16886

October 7, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On April 29, 1997, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Eastern Omni Constructors, Inc., Greensboro, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's finding that Foreman Ted Williams unlawfully communicated an overbroad no-distribution rule, we rely solely on the implicitly credited testimony that Williams referred to the adverse consequences of giving out union literature ''on the job.'' We note further that we do not adopt the speculative remarks in fn. 9 of the judge's opinion.

[2] In affirming the judge's conclusion that the Respondent violated Sec. 8(a)(1) by promulgating a rule forbidding the display of all but company-issued decals on hard hats, we recognize the legitimacy of the Respondent's concern about some inflammatory decals (unrelated to union activities) that some employees had been wearing. We note, however, that the Respondent could have more narrowly, and lawfully, addressed this problem. It need not have broadly proscribed the wearing of all noncompany insignia, including those associated with protected concerted union activities.

Jasper C. Brown Jr., Esq., for the General Counsel.
William Joseph Austin Jr. and *Catherine Ricks Piwowarski, Esqs.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Greensboro, North Carolina, on December 18 and 19, 1996. The charge was filed on February 21, 1996,[1] and the complaint was issued on May 17. The complaint alleges various independent violations of Section 8(a)(1) of the National Labor Relations Act, participation in an unfair labor practice strike by certain employees, and the layoff and refusal to recall five employees in violation of Section 8(a)(3) of the Act. The Respondent's timely answer denies any violation of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

[1] All dates are 1996 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in general construction at its jobsite at Brown Summit, North Carolina, where it annually receives goods and materials valued in excess of $50,000 directly from points outside the State of North Carolina. The Respondent admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent, at its Brown Summit, North Carolina jobsite, provides maintenance and construction services for a large Proctor and Gamble facility. The Respondent's work force at Brown Summit varies in size, depending on the needs of Proctor and Gamble. In the past several years it has been as small as 12 and as large as 250. In the words of Mike Barnum, the Respondent's vice president in charge of project management, the manpower graph ''looks like the Alps.'' Various crafts are needed at different times. Thus, when Proctor and Gamble decides to set up a production line to produce a particular product, the Respondent performs the work necessary to make the line operational. The primary crafts employed are pipefitters, millwrights, and electricians. From time to time, some of the Respondent's employees are assigned to provide maintenance services directly to Proctor and Gamble. These employees, when so assigned, are overseen by Proctor and Gamble supervisors, and they refer to themselves as working ''in the plant.'' The Respondent's project manager is Carl Harbin, the construction manager is Ted Gammon, the electrical superintendent is Fred Redman, and the general electrical foreman is John Bauer. During the period relevant to this proceeding, Daryl Bailey, Ted Williams, and Mitch Williams were foremen. The Respondent's employees are not represented by a labor organization.

In December 1995, the Respondent needed increased manpower in order to complete two projects, a production line for denture cream and relocation of the plant engineering offices, both of which were to be turned over to Proctor and Gamble about February 1. Fourteen new employees were hired in December 1995: five pipefitters, two pipe welders,

five electricians, and two electrician apprentices.[2] Electricians Wacon Cottingham and Tommy West applied for work together, were interviewed on December 12, and began work on December 13, 1995. Apprentices Matt and David Steiner, who are brothers, were interviewed together on December 13 and began work on December 18, 1995. Electrician Billy Forester also began work on December 18, 1995.[3] A new electrical crew was created, and Mitch Williams was promoted to foreman.[4] He understood that this was a temporary promotion and that he would resume working with his tools in February.

On December 20, 1995, both Cottingham and Forester placed IBEW stickers on their company owned hard hats. West, on January 5, passed out union literature in a break room in the presence of several supervisors. The Steiners did not engage in any union activity.

The Respondent does not lay off employees by seniority. Both Vice President Barnum and Project Manager Harbin testified that the chief criteria for layoff is to keep the ''most qualified'' people. The Respondent's reduction-of-force (ROF) termination policy provides as follows:

> In determining which employees are to be retained, consideration will be given to (not all inclusive):
>
> (1) Ability of the employees to do the available work.
>
> (2) Current and past job performance.
>
> (3) Transferability of skills to other positions within the Company.
>
> (4) Compliance with Company and site regulations.[5]

On February 8, the last workday of the week, the Respondent laid off 14 employees including 4 pipefitters; 2 pipefitter apprentices; 1 pipe welder; 4 electricians, including Cottingham and Forester, who were on strike at the time, and West; 2 electrician apprentices, the Steiners; and 1 welder who had been in an electrical crew. Of the five pipefitters and two pipe welders hired in December 1995, only one, pipefitter Barker, was laid off. Electrician Jerry Hill, who was hired the week of December 24, 1995, was not laid off.[6]

Although the Respondent was aware that Proctor and Gamble was going to move a production line from Pennsylvania to its Brown Summit plant, that work had not begun, and did not begin until February 25. On February 25, four new electricians were hired. Project Manager Carl Harbin testified that carrying 14 employees on the payroll, when there was insufficient work for them, would be spending the money of the client, Proctor and Gamble, unwisely.

B. *The 8(a)(1) Allegations*

The complaint alleges that, on December 20, 1995, Foreman M. Williams interrogated employees regarding the union activities of other employees and threatened employees by advising that employees had been discharged in retaliation for engaging in union activities. Electrician West testified that, on December 20, 1995, M. Williams asked if he had noticed that Forester, with whom West had been sitting, had a union sticker on his hard hat and thermos, and whether West knew him. West testified that M. Williams commented that it ''looks like this stuff is starting all over again,'' explaining that ''about two years ago we had some guys to come in . . . [and] they had to let them go on account of passing out [union] literature and stuff like that.'' M. Williams denied this conversation, specifically testifying that he had not been employed by the Respondent for 2 years and had no such information.

Forester began wearing a union sticker on his company owned hard hat on December 20, 1995. I credit M. Williams' denial of this conversation. In doing so I note that the General Counsel did not attempt to elicit what response West gave to the purported questions, which certainly suggests that a reason for the absence of a response was the absence of a question. M. Williams began working for the Respondent in February 1995, less than a year before this conversation. There was, as he credibly testified, no basis for referring to an alleged 2-year old incident of which he had no knowledge.

The complaint also alleges that M. Williams, on December 28, 1995, interrogated West regarding his union activities and advised that employees had been discharged in retaliation for their union activity. On December 28, 1995, West had, as was his practice, given Wacon Cottingham a ride to work. Cottingham wore a union T-shirt to work that day. West testified that M. Williams stated that he had noticed that ''the guy that was riding with me'' was wearing a union T-shirt and then asked if West were a union man. West states that he responded that he was not; but, shortly thereafter, he told M. Williams that he was a union member. He testified that M. Williams stated that he had no problem with that, as long as West did his job and did not ''start acting silly and stuff . . . like these other two guys did,'' an apparent reference to the previously mentioned alleged discharges.[7] M. Williams denied interrogating or threatening

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[2] Two pipefitters and one pipe welder first appear on the payroll ending December 3, 1995; they may have actually been hired in late November.

[3] Cottingham, West, the Steiners, and Forester did not disclose any union affiliation when seeking employment.

[4] Mitch Williams shall hereinafter be referred to as M. Williams to distinguish him from his brother Ted Williams, hereinafter referred to as T. Williams.

[5] The Respondent, in its brief, appears to contend that the discriminatees, having been hired in December for the Respondent's immediate needs, were terminated when those needs were met. This argument is contrary to the sworn testimony of Project Manager Harbin who, concerning the layoff of February 8, testified that the Respondent ''tried to use the same criteria in every case. We keep the most qualified people with the job.'' Vice President Barnum specifically testified that the Respondent does not lay off by seniority. Documentary evidence reveals that the Respondent, on February 8, did not lay off by seniority.

[6] Electrician Jerry Hill appears to be a person other than another electrician named Hill who had received warnings in September 1994 and who counsel for the Respondent represented had been terminated on December 21, 1995.

[7] West testified that M. Williams concluded the conversation by advising him that he would be ''all right'' if he did his job and did not talk too much about the Union. The complaint alleges that on December 28, 1995, M. Williams threatened an employee with discharge for engaging in union activities. It appears that this alleged remark is the basis for that complaint allegation, although the General Counsel does not mention it in his brief. The complaint does not allege a partial gag rule, i.e., not talking ''too much'' about the Union. In any event, I do not credit West's testimony regarding this conversation, and consequently, I make no finding in this regard.

West. He acknowledged that West told him that he was a union member and that he told West that his union affiliation did not matter so long as he came to work and did his job.

I credit M. Williams' testimony. His demeanor was more impressive that of West. West and Cottingham had applied for work together, and both began work on December 13, 1995. West drove Cottingham to work, and West's testimony that M. Williams began the purported conversation by referring to the person West brought to work confirms that this was common knowledge. Cottingham, like Forester, began wearing a union sticker on the company owned hard hat on December 20, 1995. Thus, Cottingham's union sticker, which he began wearing more than a week before this purported conversation, would have provided ample opportunity for M. Williams to have initiated such a discussion well before December 28. West appeared to confuse the remarks he attributed to M. Williams. Thus, when testifying regarding the December 20, 1995 conversation, West referred to M. Williams speaking about the alleged termination ''two years'' ago of ''some guys;'' whereas, in relating the purported conversation of December 28, West has M. Williams referring to ''two guys.'' In testifying about this alleged threat, West acknowledged that he could not ''remember all that, but it was something like that, you know.'' I find that West voluntarily informed M. Williams of his union affiliation and that M. Williams did not refer to an alleged 2-year old event of which he had no knowledge.

The complaint alleges that, on December 26, 1995, Foreman T. Williams threatened employees with discharge for engaging in union activities. T. Williams observed Forester hand a union leaflet to a Proctor and Gamble employee as Forester was walking to the break trailer. A nearby clock showed it was 8:55 a.m., whereas break did not begin until 9. Shortly after this, in the nonsmoking break trailer and in the presence of employee M. Steiner, T. Williams told another foreman, Bailey, that ''if Ted Gammon saw that union guy giving out union literature on the job he was going to send [him] up the hill.''[8]

Whether Forester was in technical violation of the Respondent's valid solicitation and distribution rule is immaterial.[9] The issue is what was communicated to the employee, M. Steiner, who overheard T. Williams' comment. The statement heard by Steiner was far broader than the Respondent's valid rule which prohibits solicitation and distribution ''on Company property during working time.'' The valid rule clearly explains working time as not including lunch time, breaktime, or before and after work. There is no restriction in the Respondent's rule regarding where distribution or solicitation may take place, just that it must not occur when ''an employee is expected to be working.''[10] T. Williams, when reporting that the ''union guy'' was going to be sent ''up the hill,'' clearly threatened discharge. The offense he cited was ''giving out union literature on the job.'' Although the Respondent's rule is not unlawfully broad, that is not what T. Williams communicated. He communicated a clear threat that employees who gave out union literature ''on the job'' would be terminated. *NTA Graphics*, 303 NLRB 801 (1991). In so doing, the Respondent violated Section 8(a)(1) of the Act.

The complaint alleges that, on January 26, M. Williams informed employees that the Respondent was changing its layoff procedure in order to dissuade support for the Union. The evidence adduced in support of this allegation was testimony by West concerning a conversation that supposedly occurred on December 29, 1995. West asserts that M. Williams stated that there was going to be a layoff and that, although employees were usually laid off for poor attendance or job performance, he thought that the Respondent was going to lay off by seniority because he thought the last ones hired were members of the Union. M. Williams denied these remarks. He noted that there were always rumors about layoffs going around, but that he did not learn of the layoff of February 8 until that date.

There is no evidence before me explaining the almost 1-month discrepancy between the date of the complaint allegation and the only testimony relating to that allegation. I find it unlikely that such a conversation would occur some 2 weeks after the beginning of an 8-week job. There is no evidence of any union activity by the Steiner brothers, nor is there evidence of any union activity on the part of Hill and Russell, the last two electricians who had been hired.[11] Thus, the premise on which M. Williams' alleged comment was based, that the last employees hired were members of the Union, did not exist. M. Williams was a temporary foreman and was not consulted regarding the layoff. I credit M. Williams' denial and find that he did not make these remarks that West attributed to him.

The complaint contains eight allegations relating to the Respondent's promulgation and enforcement of a rule prohibiting the wearing of insignia, other than company authorized items, on the company owned hard hats issued to the Respondent's employees. The text of the rule is as follows:

Company-Owned Hard Hats

> Eastern Omni Constructors, Inc. (the ''Company'') prohibits the wearing or display on Company-owned hard hats of all stickers, decals, pins, badges, buttons, or other insignia that have not been specifically authorized or issued by the Company. An employee who violates this policy by wearing or displaying noncompany-authorized items on his or her Company-owned hard hat, or who refuses to remove such items when re-

[8] The transcript uses the word ''them'' instead of ''him.'' It is corrected. M. Steiner recalled T. Williams saying ''on company time'' instead of ''on the job.'' I base my finding on the comment which T. Williams admitted and additionally note that my finding would be the same if based on M. Steiner's testimony since either version threatens termination based on an unlawfully broad rule. *Southeastern Brush Co.*, 306 NLRB 884 (1992).

[9] Forester was not disciplined. It may be that the clock used by the electricians was fast, or the clock observed by T. Williams was slow. It is possible that Forester had been given permission to go to break early.

[10] The text of the rule is as follows:

> Employees are prohibited from soliciting or distributing literature on Company property during working time.
>
> Working time is defined as the time an employee is expected to be working. It does not include an employee's free time, i.e., before or after work, lunch, breaktime, or other free time, whether the employee is being paid for that time or not.

[11] Payroll records reflect that electrician Hill began working the week ending December 24, and electrician Russell began working on December 26, 1995; thus, both started after West, Cottingham, and Forester.

> quested by a Company representative, will be subject to disciplinary action up to and including immediate termination of employment.
>
> This policy does not prohibit the wearing or display of noncompany-authorized items on an employee's own clothing or articles of personal property, provided that the items do not have the potential to jeopardize employee safety, to damage Company equipment, to create employee distraction or dissension, or otherwise to interfere with the business of the Company.

It is undisputed that this rule was announced on January 23 and, thereafter, uniformly enforced. It is also undisputed that, although the Respondent contends the rule had existed in the past, it was not reduced to writing until after January 23.[12] The promulgation of this rule was precipitated by an incident on January 22, when Project Manager Carl Harbin observed a pipefitter wearing a confederate flag decal on his hard hat. He considered this symbol to be inflammatory. A safety meeting had already been scheduled that day and, at that meeting, he explained that he had seen a rebel flag on a company hard hat and that he wanted everything except company issued stickers removed from the company owned hard hats. Harbin explained that he was aware that Proctor and Gamble was sensitive to issues relating to diversity, and that he, on at least two occasions, had received complaints from employees concerning confederate flags on the clothing of other employees. On both of those occasions he requested the offending employees to change clothing, or turn it inside out. Harbin had not received any complaint regarding the flag worn by the pipefitter and did not request him to remove it on January 22. The pipefitter removed it on January 23 in compliance with the announced rule.

On January 23 the rule was announced to all crafts. General Electrical Foreman John Bauer made the announcement to the electrical crews. Union stickers were not mentioned. Rather, Bauer's direction was to remove all decals not issued by the Company. The specific example he cited was stickers with the number 3, a reference to NASCAR driver Dale Earnhardt's car. Immediately after the meeting, Cottingham and Forester, who had been wearing union stickers, approached Bauer and advised that they were on strike because of unfair labor practices, and that if there were any questions to contact the Union. As Cottingham and Forester were checking out, they explained that they were going to wear their union stickers on the hard hats.[13] West was not at work on January 23 or 24. When he returned, on January 25, M. Williams informed him of the rule prohibiting all but company insignia on hard hats, and West questioned whether he would be fired if he violated the policy. Bauer became involved in the conversation, and he and West left the floor. The conversation continued in Redman's office where Bauer and Redman advised West that he could not have anything but company insignia on his hard hat and that, if he disobeyed the rule, he would be disciplined. West placed the sticker on his clothing.[14]

The credible testimony of Harbin establishes that the Respondent's enforcement of the rule prohibiting all but company owned insignia on hard hats was because of Harbin's concern; he ''knew the inflammatory nature of this symbol,'' the confederate flag that he had observed. Although there is testimony relating to the different colored tape identifying the various crafts, and the presence of special stickers indicating certification as a fork lift driver or person qualified to deal with high voltage, the record also establishes the wearing of Carolina Tar Heel decals, NASCAR decals, Harley Davidson and Hilty stickers, and the IBEW stickers worn by Cottingham and Forester. On January 22, when Harbin spoke with the supervisors at a safety meeting, he specifically mentioned having seen a rebel flag on a hard hat. No other reason for enforcement of the rule was mentioned. There is no evidence that any safety concerns were cited at that time, or by Bauer when he announced the rule to the electricians on January 23.

Employees have the protected right to wear union insignia while at work. *Republic Aviation Corp. v. NLRB*, 314 U.S. 793, 801–803 (1945). The Board, in cases involving interference with that right, has reasoned as follows:

> While employees have the right to wear union insignia at work, employers have the right to take reasonable steps to ensure full and safe production of their product or to maintain discipline. Therefore, the Board holds that a rule which curtails that employee right is presumptively invalid unless special circumstances exist which make the rule necessary to maintain production or discipline, or to ensure safety. *Kendall Co.*, 267 NLRB 963, 965 (1983).[15]

In the instant case, there is no evidence of any special circumstances relating to safety. Thus the cases of *Standard Oil Co. of California*, 168 NLRB 153 (1968), and *Andrews Wire Corp.*, 189 NLRB 108 (1971), cited by the Respondent, are inapposite.[16]

[12] Whether the Respondent had a verbal rule that had been enforced in the past is immaterial.

[13] M. Steiner testified that, following promulgation of this rule, Foreman Bailey commented to Foreman T. Williams that he had told one of his men that he had better remove his union sticker or he was going to fire him. I do not credit this testimony. Following promulgation of the rule, Forester went to Bauer with Cottingham; there was no interchange with Bailey. Forester, who was supervised by Bailey, did not testify to any such threat, and Bailey credibly denied making any such statement. M. Steiner also testified that, on that same day, T. Williams commented to other foremen, ''I guess Carl Shore's idea worked. The union boys went on strike over their sticker this morning.'' This statement is not alleged as a violation of Sec. 8(a)(1), and T. Williams credibly testified that, as of mid-January, he had been transferred and was working under the direction of Proctor and Gamble supervision. He was not in the Eastern Omni area; he was ''in the plant.''

[14] I need not determine whether West had already placed a sticker on his hard hat, as he claims, or whether he carried the sticker in his hand and informed T. Williams, Bauer, and Redman that the Union had directed him to put the sticker on his hard hat, but he was a single parent and needed his job, as they testified. Regardless of the circumstances, the rule was enforced by M. Williams, Bauer, and Redman, and West obeyed it.

[15] In *Kendall*, special circumstances were found. The union keychain dangling from the employee's pocket was found to be a hazard since the employee often leaned over machinery.

[16] In *Malta Construction Co.*, 276 NLRB 1494 (1985), the Board distinguished *Standard Oil* and *Andrews*, noting that the employees in *Andrews* worked in ''a poorly lighted mill'' and the employees in *Standard Oil* worked at a refinery with ''highly volatile, dangerous, and hazardous gases necessitating an elaborate safety precaution system.'' Id. at fn. 4.

The record also does not establish any special circumstances relating to discipline that would override the employees' right to wear union insignia on the company issued hard hat. I recognize that, in various circumstances, display of the confederate flag has caused controversy. See *N.A.A.C.P. v. Hunt*, 891 F.2d 1555 (11th Cir. 1990). The Respondent, in its brief, notes Proctor and Gamble's commitment to sensitivity to the concerns of a diverse work force, and it points out the Respondent's efforts to follow Proctor and Gamble's lead, citing the two occasions where Harbin approached workers who were wearing clothing with confederate flags. This evidence establishes that the Respondent has been successful in dealing with individual employees when problems regarding insensitivity have arisen. There is no evidence on this record reflecting any breakdown of discipline that would establish a special circumstance sufficient to infringe on the right to display union insignia.[17] Harbin did not tell the pipefitter that he observed to remove the flag from the hard hat, noting that he had received no complaint with regard to it. The Respondent has cited no case authority, and I am aware of no case authority, that permits a ban on all insignia in the name of discipline when there is no evidence of any problem relating to discipline. Respondent's rule reaches far beyond a management concern regarding sensitivity to a diverse work force. It undercuts employee Section 7 rights established in the Act and recognized by the Supreme Court.

The Respondent's permitting employees to wear union insignia on clothing does not vitiate the violation. As discussed above, employees have a right to display union insignia absent special circumstances. I have found that no special circumstances sufficient to circumscribe that right have been established.[18] Thus, the Respondent, by promulgating the rule forbidding the display of all but company issued decals on hard hats, interfered with employees' free exercise of the right to display union insignia. *Northeast Industrial Service Co*., 320 NLRB 977 (1996); *United Parcel Service*, 312 NLRB 596 (1993); and *Malta Construction Co*., 276 NLRB 1494 (1985). In so doing, the Respondent violated Section 8(a)(1) of the Act. Similarly, by enforcing the rule, M. Williams, Bauer, and Redman independently violated Section 8(a)(1) of the Act.

C. *The Strike*

The complaint alleges that the strike in which Cottingham and Foster engaged was an unfair labor practice strike. Cottingham and Forester went on strike immediately following the announcement of the Respondent's unlawful rule on January 23. Bauer acknowledges that, as they were leaving, they informed him that the strike was about the ''unfair labor practices[;] . . . they were going to wear the stickers on hard hats.'' After Cottingham and Forester told Bauer that they were going on an unfair labor practice strike, that ''they were going to wear the stickers,'' Bauer notified Redman. Redman informed Gammon and Harbin that ''we had two people that were walking out claiming to be on strike.'' The Respondent, in its brief, argues that Cottingham and Forester ''claimed to be on strike'' when they were discharged, asserting that ''[t]his convenient 'strike' occurred just before their jobs were completed.''[19] The Respondent neglects to acknowledge that the strike began immediately after the Respondent announced its unlawful rule and that Cottingham and Forester cited the prohibition on the wearing of their union stickers as the reason for their action. The Respondent also fails to acknowledge that, on January 31, it received a letter from the Union dated January 29, confirming that Cottingham and Forester were on strike, noting that they were not actively picketing,[20] and informing the Respondent that they remained on strike until further notice. Thus, contrary to the Respondent's argument that the strike was ''convenient,'' the record establishes that the strike was precipitated by the Respondent's unlawful action. It was, as the General Counsel alleges in the complaint, an unfair labor practice strike.

Even if I had found that the Respondent's promulgation of its rule did not violate the Act, Cottingham and Forester would have been engaged in the protected concerted activity of protesting a change in working conditions, an economic strike. *Crystal Princeton Refining Co*., 222 NLRB 1068, 1070 (1976). As economic strikers they would have been subject to permanent replacement; but that is not the manner in which they were treated by the Respondent. As hereinafter discussed, the Respondent did not replace them; it terminated them.

D. *The 8(a)(3) Allegations*

1. Facts

The complaint alleges that, on February 8, the Respondent discriminatorily laid off, and failed and refused to rescind the layoffs of, M. Steiner, D. Steiner, West, Cottingham, and Forester. At the time of the layoff the work on the denture cream line and engineering offices was virtually complete. Although General Counsel elicited testimony relating to conversations concerning upcoming work, there is no probative evidence that sufficient work was available immediately after February 8 to justify keeping 14 employees on the payroll. Accordingly, I find that the layoff was economically justified. The issue, therefore, is whether the five alleged discriminatees were discriminatorily selected for layoff. As

[17] In *Malta Construction Co*., supra at 1495, the respondent, among other factors, sought to justify its rule by arguing that some employees placed vulgar stickers on their hats and that employees might be called on to stop traffic, thereby creating an undesirable public image. The Board held that the evidence did not establish the public contacts argument.

[18] The Respondent, although noting that the hard hats are company owned, does not assert its property interest as the basis for its action. See *Reno Hilton*, 319 NLRB 1154 fn. 4 (1995). If the Respondent had made such an assertion, I would not have found it persuasive since its property interest was not sufficiently compelling to have prompted the Respondent to enforce the alleged preexisting verbal rule since a forgotten date in either September or October 1995.

[19] The strike began 16 days before the layoff.

[20] The absence of picketing does not constitute abandonment of a strike. *Intermountain Corp. (Michigan)*, 90 NLRB 1145 (1950). On January 23, Cottingham and Forester had stated that they were going on strike. On January 25, they refused the voluntary quit slips given to them, explaining that they were on strike. On January 29, the Union wrote the Respondent reconfirming that Cottingham and Forester were on strike.

discussed above, the Respondent does not lay off by seniority.

The Steiners engaged in no union activity. M. Steiner and West were on M. Williams crew but did not regularly take breaks together. M. Steiner took his breaks in the nonsmoking break trailer.[21] West did not regularly go to a break trailer due to a problem with his leg. When he did, such as at the lunch break, he went to the smoking break trailer. The remaining alleged discriminatees were on different crews. D. Steiner was moved to T. Williams crew on December 26. Forester was on Daryl Bailey's crew, and Cottingham was under James Montgomery. Neither Cottingham nor Forester was asked about, or testified to, regular contact with either Steiner. D. Steiner testified that, on one occasion, West walked by him in the smoking break trailer and said, ''[B]rother, you need to come to the hall.'' He states that Bauer was present, in the smoking break trailer, when this was said.[22] Bauer acknowledged observing West, Forester, and Cottingham eating together. From time to time others, including the Steiners, would join them. He did not overhear West's comment to D. Steiner.[23] The first time any supervisor became aware of a Steiner's union affiliation was on the day of the layoff when, after being told he was to be laid off, M. Steiner commented to M. Williams that ''maybe the Union can find me a job.''

M. Steiner falsified his job application by stating that he had 3-1/2 years' experience. At the hearing, in December 1996, he testified that, when he applied, he had just under 2 years' experience. Although he states that M. Williams complimented his work and was going to see about getting him a raise, this never occurred.[24] In mid-January, M. Steiner spoke with Bauer concerning layoffs. Bauer commented that ''we might all be gone tomorrow and we may all be here for a while.'' He thumbed through a list that had about half a dozen highlighted names, which M. Steiner understood to be employees with attendance problems, and then said that, as far as he was concerned, there was nothing to worry about.

D. Steiner sustained an on-the-job injury on January 15. He suffered a hyperextension of his knee. He was placed on light duty. He continues to received total temporary disability benefits from the workers' compensation fund.

West had been involved in an automobile accident in 1994. When asked if that limited things he could do on a construction job, West replied, ''Well, I can't be climbing . . . way up in the air without . . . a genie boom or something. We most of the time use ladders and I didn't want to be on one of them because it started hurting the ankle real bad standing on a ladder.'' He acknowledges that, if he did not go to the break trailer, he would elevate his leg during the 15-minute break. West received a written warning for 11 instances of absenteeism or tardiness when he returned to work on January 25, after having missed work on January 23 and 24. Thereafter he was absent on February 5 and 6. On one occasion M. Williams found him with his shoe off, massaging his leg, which was swollen. M. Williams told West that he might be able to do that on some other job, but the Respondent was strict. He suggested that, if his leg were hurting that bad, that he should go to the restroom.

Cottingham had 12 years' experience as an electrician. He was warned for 2 days of absenteeism on December 26, 1995, but thereafter had no problem. At one point he was assigned to install the drives that control the speed of motors in a control panel. There were no complaints regarding his work performance, and he was complimented on his work by his foreman, Montgomery. On January 23, immediately after promulgation of the Respondent's unlawful rule, he went on strike.

Forester was the most experienced of the discriminatees, with 30 years' experience as an electrician. The Respondent, recognizing his skills, assigned him to perform control work in the PLC area. He received no warnings of any kind. On January 23, on promulgation of the Respondent's unlawful rule, he went on strike with Cottingham.

On January 25, Cottingham and Forester returned to the jobsite where, at the guard shack, they were given their paychecks by Harbin and Gammon.[25] With the checks were voluntary quit slips. They refused the slips, explaining that they were on strike. By letter dated January 29, the Union advised the Respondent that Cottingham and Forester were on strike.

On February 8, the Respondent laid off 14 employees, including the 5 alleged discriminatees. Construction Manager Gammon testified that D. Steiner and West were selected because of their physical limitations, M. Steiner was selected because he was no more qualified that other helpers who were paid at the Class 4 level, and Cottingham and Forester were selected because they were ''not there at the time and that was it.''

2. Analysis and concluding findings

The analytical framework of *Wright Line*[26] is applicable in dual or mixed motive cases after the General Counsel has established employee union activity, employer knowledge of that activity, animus towards such activity, and adverse action taken against those involved in, or suspected of involvement in, that activity. As hereinafter discussed, there is no question that Cottingham and Forester, who were engaged in a strike, engaged in union activity and that the Respondent

[21] This is the trailer in which Foremen Bailey, M. Williams, and T. Williams took their breaks. None of the acknowledged union members took breaks in that trailer. No foreman is alleged to have questioned M. Steiner regarding his union affiliation.

[22] West testified that M. Steiner was ''undercover.'' He acknowledged that he ''slipped'' by making the comment about coming to the hall to D. Steiner. Neither Forester nor Cottingham reported frequent association with either Steiner. The comment was made as West walked by D. Steiner; he was not sitting with him. I do not credit D. Steiner's testimony that he regularly ate lunch with Forester, Cottingham, and West. Rather, I find, consistent with West's testimony, that the acknowledged union members were sensitive to the status of the Steiners as unacknowledged union members and did nothing that would have exposed their status.

[23] The comment could be construed as a solicitation to someone not involved in union activity to become involved in union activity. In any event, I find it was not overheard.

[24] M. Williams was not an experienced foreman. Redman reported to Gammon that M. Steiner did not have qualifications any greater than other helpers.

[25] I specifically discredit Gammon's testimony that it was his impression that ''they had just walked off the job.'' Redman told Gammon and Harbin that they had walked out ''claiming to be on strike.''

[26] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

was aware of that activity. There is also no issue regarding union activity and the Respondent's knowledge of that activity by West.

Regarding animus, I note that some animus is established by the independent violations of Section 8(a)(1) of the Act. Although T. Williams' threat of discharge for handing out union literature on the job violated the Act, the threat related to Forester, and it was communicated only to M. Steiner, who T. Williams did not identify as having any affiliation with the Union. The Respondent's prohibition on the wearing of all but company insignia on hard hats also violated the Act; however, I have found no evidence of antiunion motivation in the promulgation of the rule. Notwithstanding the foregoing, the Respondent's conduct towards Cottingham and Forester unquestionably establishes animus. The Respondent sought to treat these employees, who struck over the Respondent's unlawful prohibition on the wearing of union stickers, as having voluntarily quit. In so doing the Respondent evidenced a fundamental disdain for the lawful exercise of Section 7 rights. ''Calling a strike a voluntary quit . . . is to write Section 13 out of the Act.''[27] *Anderson Cabinets*, 241 NLRB 513, 518–519 (1979). See also *Matlock Truck Body & Trailer Corp*., 217 NLRB 346, 349 (1975), and *Bartlett-Collins Co*., 230 NLRB 144, 169 (1977). The Respondent informed the strikers on January 25, well before the layoff of February 8, that it considered them to have voluntarily quit. In so doing, the Respondent clearly revealed its animus towards employee union activity and the exercise of protected Section 7 rights.

The Steiners did not engage in any union activity, although they were members of the Union. Despite the absence of union activity by them, the General Counsel argues that the Respondent was aware of their union affiliation. The General Counsel, relying on the testimony of D. Steiner, whom I do not fully credit, and of Bauer, who acknowledged seeing the Steiners, as well as others, sometimes eating with West, Cottingham, and Forester, seeks an inference of knowledge. M. Steiner, as noted above, generally took breaks in the nonsmoking break trailer. When T. Williams made the statement about ''the union guy,'' referring to Forester handing out literature, he made no mention of any suspicion of a connection between Forester and M. Steiner. West confirmed that the acknowledged union members were circumspect regarding the affiliation of the apprentices, the Steiners. The Respondent's supervisors credibly denied knowledge of the Steiners' union affiliation. I find no probative evidence that the Respondent was aware of any union activity or affiliation by the Steiners. Thus a ''fundamental prerequisite'' for establishing a discriminatory motive has not been established. *Bayliner Marine Corp*., 215 NLRB 12 (1974). The absence of evidence establishing knowledge by the Respondent of any union activity or affiliation by the Steiners precludes the finding of a violation of the Act.[28]

Regarding West, I find that the Respondent has met its burden of establishing that it would have laid off West without regard to union activity. Although West asserted that he did everything that was asked of him, M. Williams was aware of his physical problems and had spoken candidly with him on one occasion when he found West massaging his leg instead of working. West's spontaneous answer to counsel regarding having problems being on a ladder confirms his limitations. Both Redman and Gammon credibly testified to having observed West on the job and noted his limitations. I am satisfied that, when present on the job, West endeavored to do his best. I am likewise satisfied that his limitations were apparent. Furthermore, West had been warned for 11 attendance violations on January 25, and despite this, he missed work again on both February 5 and 6.

A *Wright Line* analysis is unnecessary when considering the terminations of Cottingham and Forester. The Respondent's brief, consistent with Gammon's testimony, concedes that they were terminated because they were not present. The Respondent does not address the undisputed evidence that the reason they were not present was because they were on strike. At no time were Cottingham and Forester assured that the Respondent would honor their rights as strikers. *Matlock Truck Body & Trailer Corp*., supra at 349. The Respondent's current records reflect that Cottingham and Forester were terminated on February 8. Although the complaint pleads the terminations as a layoff, the reduction-of-force documents state ''date terminated.''[29] This was not a temporary layoff. Cottingham and Forester were permanently terminated. Whether the terminations are characterized as layoffs or discharges is immaterial. *Colonial Press*, 204 NLRB 852 fn. 4 (1973). There was no mixed motive. Cottingham and Forester were ''not there'' because they were on strike. They told this to Bauer at the time they left. The Respondent first treated Cottingham and Forester as having voluntarily quit.[30] It then included them in a reduction-of-force because they

[27] Sec. 13 of the Act provides: ''Nothing in this Act . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike.''

[28] Even if I were to have found that the Respondent was aware of the union affiliation of the Steiners, I would, nevertheless, find no discrimination in their selection for layoff. D. Steiner had been injured on the job and placed on light duty. The Respondent was under no obligation to continue to find light duty work for him. At the time of this hearing he was still drawing total temporary disability workers' compensation benefits. M. Steiner falsified his job application, reporting that he had 3-1/2 years' experience. Although the falsification of the application was not discovered until the hearing, Construction Manager Ted Gammon credibly testified that M. Steiner was selected for layoff because he was no more qualified than other helpers on the job who were making less money. Thus, his selection for layoff was simply an economic decision. Although Bauer had told M. Steiner that he had nothing to worry about, that representation was made on the basis of an absenteeism and tardiness list. Gammon's decision was based on relative skills and pay rate.

[29] The Respondent's policy that governs reduction-of-force, voluntary quit, and termination for cause is titled ''Termination Policy and Procedures.'' The introductory paragraph reflects that the policy is to provide guidelines ''for implementing terminations of employment.''

[30] Although I have found that striking employees Cottingham and Forester were terminated on February 8, the Respondent, by tendering the voluntary quit slips to them on January 25, arguably discharged them on that date. Indeed, the Respondent's answer states that ''certain employees characterized their action as a strike but Respondent alleges and says they voluntarily quit and Respondent subsequently changed the status of the separation from employment to ROF.'' The Respondent did not disavow that it continued to consider them as having voluntarily quit. *Cargill Poultry Co*., 292 NLRB 738, 739 (1989).

were not present. The reason they were not present was that they were exercising their statutory rights by striking.[31]

The evidence in the instant case is even more compelling than the evidence in *National Fabricators*, 295 NLRB 1095 (1989), where the respondent selected seven employees for a temporary layoff because it believed they were likely to engage in the protected union activity of honoring a picket line that might be set up in the near future. In finding a violation the Board stated that ''we think it clear beyond peradventure that the criterion used by the Respondent to select employees for layoff—disfavoring employees who were likely to engage in protected union activities—is the kind of coercive discrimination that naturally tends to discourage unionization and other concerted activity.'' Ibid. In the instant case the employees selected were actually engaged in protected union activity. They were not selected for temporary layoff; they were terminated. I find that the ''direct and proximate cause'' of the selection of Cottingham and Forester for layoff was their strike activity. *Bingham Willamette*, 282 NLRB 1192, 1194 (1987). By terminating Cottingham and Forester, the Respondent violated Section 8(a)(3) of the Act.

The Respondent, in an apparent attempt to minimize its liability for its unlawful actions, argues that neither Cottingham nor Forester ever made an unconditional offer to return to work. The Respondent does not cite *Abilities & Goodwill*, 241 NLRB 27 (1979), the lead case in this area of the law. In *Abilities & Goodwill*, the Board held that, when a striker is discharged, the obligation is on the offending respondent to offer reinstatement since, having been discharged, it would be futile for the striker to make an unconditional offer to return to work.[32] Whether the striking employee is engaged in an economic or unfair labor practice strike is immaterial. Cottingham and Forester were engaged in an unfair labor practice strike. They were terminated because they were ''not there and that was it.'' The reason they were ''not there'' was that they were on strike, and the Respondent violated the Act when it terminated them. Having terminated Cottingham and Forester, it is the Respondent's obligation to offer them reinstatement.

CONCLUSIONS OF LAW

1. By threatening that employee who handed out union literature on the job would be discharged and by maintaining and enforcing a rule prohibiting employees from placing any union stickers or decals on its hard hats, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By terminating the employment of striking employees Wacon Cottingham and Billy Forester because they engaged in union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge, February 8, 1996, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). As in *Abilities & Goodwill*, the Respondent will be permitted, at compliance, to avoid or reduce its backpay obligation by establishing that the reinstatement offer would not have been accepted. Id. at fn. 5.[33]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[34]

ORDER

The Respondent, Eastern Omni Constructors, Inc., Brown Summit, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discharge for handing out union literature on the job.

(b) Maintaining and enforcing a rule that prohibits the display of any union stickers or decals on its hard hats.

(c) Discharging or otherwise discriminating against any employee for supporting Local Union 342, International Brotherhood of Electrical Workers, AFL–CIO, or any other union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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[31] Even if I were to have found that this was a mixed motive case, the Respondent did not establish that, absent union activity, Cottingham and Forester would have been selected for layoff. The Respondent retained an electrician, Dickerson, who, prior to February 8, had worked for two foremen, neither of whom had been satisfied with his job performance. Gammon asserted that, even if Cottingham and Forester had been present, they were not as qualified as ''some'' of the others. This answer reveals that Cottingham and Forester were, in fact, more qualified that those electricians not included in the group Gammon designated as ''some.''

[32] In *Dilling Mechanical Contractors*, 318 NLRB 1140, 1154 (1995), cited by the Respondent, the strikers were not informed that they were considered to have voluntarily quit, and effectively terminated, until after an unconditional offer to return to work was made. In the instant case, as in *Abilities & Goodwill*, the discriminatees were terminated while on strike. The continued viability of *Abilities & Goodwill* is confirmed by the Board decisions in *Super Glass Corp*., 314 NLRB 596 (1994), and *Cargill Poultry*, 292 NLRB at 740 (1989).

[33] Notwithstanding my finding that Cottingham and Forester were unlawfully terminated and my subsidiary finding, at fn. 31, that even if this were a dual motive case, neither would have been laid off on February 8 pursuant to the Respondent's policy of keeping the ''most qualified'' employees, the Respondent will also be permitted, at compliance, to establish that either Cottingham or Forester, or both, would nondiscriminatorily have been affected by a reduction-of-force at some time after February 8. *Dean General Contractors*, 285 NLRB 573 (1987).

[34] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days from the date of this Order, offer striking employees Wacon Cottingham and Billy Forester full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any replacement employees hired after February 8, 1996.

(b) Make Wacon Cottingham and Billy Forester whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its jobsite in Brown Summit, North Carolina, copies of the attached notice marked ''Appendix.''[35] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 21, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[35] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten you with discharge for handing out union literature on the job.

WE WILL NOT maintain and enforce a rule that prohibits you from wearing union stickers or decals on our hard hats.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local Union 342, International Brotherhood of Electrical Workers, AFL–CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer striking employees Wacon Cottingham and Billy Forester full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any replacement employees hired after February 8, 1996.

WE WILL make Wacon Cottingham and Billy Forester whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Wacon Cottingham and Billy Forester, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

EASTERN OMNI CONSTRUCTORS, INC.